No. 83-5924

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PAUL BEASLEY JOHNSON

v.

STATE OF FLORIDA

RESPONSE IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

PEGGY A. QUINCE
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL OF RECORD FOR RESPONDENT

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	2
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

	PAGE
Brewer v. Williams, 430 U.S. 387 (1977)	2
Houston Oil Co. v. Goodrich, 245 U.S. 440 (1918)	3
Johnson v. State, ___So.2d___ (Fla. 1983)	1
Massiah v. United States, 377 U.S. 201 (1964)	2, 3
Rudolph v. United States, 370 U.S. 269 (1962)	3
Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508 (1924)	3
United States v. Henry, 447 U.S. 264 (1980)	2, 3

PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the Citations to Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on page four of the Petition.

QUESTION PRESENTED

Whether this Honorable Court should review the factual determination made by the Florida Supreme Court and a Florida trial court concerning whether a jail inmate had become an agent of the State when he, on his own initiative, elicited incriminating information from another inmate who had been indicted for a capital offense.

STATEMENT OF THE CASE

Petitioner, Paul Reasley Johnson, was tried and convicted of, inter alia, three counts of first degree murder. The Florida Supreme Court affirmed the judgments and sentences of death. Johnson v. State, ___So.2d___ (Fla. 1983)[Petitioner's Appendix at A 1 - A 10].

Prior to trial, Petitioner had moved to suppress admissions of guilt that he made to another jail inmate, James Leon Smith. Smith was also a pretrial detainee in the Polk County Jail and had served as a police informant in the past. Smith initially approached the Petitioner to inquire about the charges against Petitioner (R 1905). Nobody asked Smith to approach Petitioner in regards to the instant case (R 1905, 1919, 1923, 1931-1933). Mr. Smith reported his first conversation with Petitioner to the Polk County Sheriff's Department two days afterward (R 1908). At that time, they did not encourage Mr. Smith to continue these conversations or to record them in any manner (R 1909). Mr. Smith also contacted an investigator with the Sheriff known to him personally, Mr. Ben Wilkerson (R 1909-1910). Mr. Wilkerson,

according to Mr. Smith, did not inquire about any future conversations, the recording of same, or even the taking of notes (R 1910). In fact, Mr. Smith did state that the idea of taking notes of his conversations with Petitioner was his own invention (R 1910). Mr. Smith, after talking to the investigators, was moved to a cell beside Petitioner (R 1912). However, he explained the move was prompted by an argument he and his jail counselor had gotten into (R 1920), and that he did not request such a move (R 1920). Mr. Smith further explained that he was not transferred directly to a cell next to Petitioner, but because the lights were out in another cell block, he did end up side-by-side with Petitioner (R 1921).

At the Motion to Suppress hearing, Petitioner claimed that Smith was acting as a State agent and had illegally obtained incriminating statements from Petitioner in violation of Petitioner's right to counsel. The trial court denied the Motion. On appeal, the Supreme Court of Florida affirmed and specifically found that the trial court ruling that Smith had not become an agent of the State was supported by the evidence.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioner is requesting this Honorable Court to determine the definition of "agent of the government" for purposes of the rule announced in Massiah v. United States, 377 U.S. 201 (1964). However, it is apparent that Petitioner requests this Honorable Court to rule on a pure question of fact, a question which does not necessitate a new or unique rule of law.

In Massiah, supra, United States v. Henry, 447 U.S. 264 (1980), and Brewer v. Williams, 430 U.S. 387 (1977), the issue involved whether a government elicitor obtained information from an accused in the absence of counsel. In other words, it was necessary to determine whether information had been deliberately elicited by a government agency, the agency relationship being assumed in those cases. Of the three cases cited above by your

Respondent, the facts in Henry more closely approximate the facts of this cause than do the facts in the other cases. However, Henry is easily distinguishable from the instant cause in that the elicitor in Henry was "expressly commissioned to secure evidence." Henry at 447 U.S. 273. Sub judice, however, the purported elicitor did not ask for any benefit or favorable treatment in exchange for any information he might acquire, nor did the government promise the elicitor that he would receive favorable treatment. The elicitor was not compensated or commissioned to secure evidence as was the elicitor in Henry.

Thus, Petitioner herein merely seeks to have this Honorable Court exercise its certiorari jurisdiction in order to define the term "agent" for the purposes of the Massiah rule. However, it is apparent that such a factual determination must be made on a case-by-case basis. This Honorable Court has dismissed writs of certiorari as improvidently granted on the ground that the issues were merely factual ones which would be of no importance except to the litigants themselves. See, e.g., Rudolph v. United States, 370 U.S. 269 (1962); Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508 (1924); Houston Oil Company v. Goodrich, 245 U.S. 440 (1918). The instant cause also represents a case wherein only factual issues need to be determined. Inasmuch as the existence of an agency relationship must be determined in each individual case, it is unnecessary for this Honorable Court to exercise its certiorari jurisdiction to determine whether or not an agency relationship existed in the instant case. The Florida trial court, and subsequently the Florida Supreme Court, determined that an agency relationship did not exist. The Florida court followed the applicable law, including this Honorable Court's decision in Henry, supra, and determined that an agency relationship did not exist.

Inasmuch as Petitioner's instant claim involves a factual determination which must be made on a case-by-case basis, this Honorable Court should decline to exercise its certiorari jurisdiction.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Peggy A. Quince

PEGGY A. QUINCE
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL OF RECORD FOR RESPONDENT

Robert J. Krauss

ROBERT J. KRAUSS
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to William C. McLain, Esquire, Assistant Public Defender, Chief, Capital Appeals, Tenth Judicial Circuit, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830 on this the 12th day of January, 1984.

Peggy A. Quince
Of Counsel for Respondent

Robert J. Krauss
Of Counsel for Respondent